

**KRONENBERGER BURGOYNE, LLP**  
Karl S. Kronenberger (CA Bar No. 226112)  
Jeffrey M. Rosenfeld (CA Bar No. 222187)  
150 Post Street, Suite 520  
San Francisco, CA 94108  
Telephone: (415) 955-1155  
Facsimile: (415) 955-1158  
[karl@KBLinternetLaw.com](mailto:karl@KBLinternetLaw.com)  
[jeff@KBLinternetLaw.com](mailto:jeff@KBLinternetLaw.com)

Attorneys for Plaintiffs UNITED STATES OF AMERICA CHESS FEDERATION, INC. and RANDALL D. HOUGH

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**UNITED STATES OF AMERICA  
CHESS FEDERATION, INC., *et al.***

## Plaintiffs,

1

SUSAN POLGAR, *et al.*

## Defendants.

**SUSAN POLGAR,**

## Counter-Plaintiff.

1

**BILL GOICHEBERG, BILL HALL, RANDY  
BAUER, JIM BERRY, KARL  
KRONENBERGER.**

### Third Party Defendants,

1

**RANDALL HOUGH,**

## Counter-Defendant.

Case No. 3:08-CV-05126-MHP

PLAINTIFFS UNITED STATES OF  
AMERICA CHESS FEDERATION,  
INC. AND RANDALL D. HOUGH'S  
OPPOSITION TO DEFENDANT  
POLGAR'S MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS  
WITHHELD ON AN INVALID  
ASSERTION OF THE ATTORNEY-  
CLIENT PRIVILEGE

DATE: September 14, 2009  
TIME: 2:00 p.m.  
CTRM: 15, 18<sup>th</sup> Floor  
JUDGE: The Hon. Marilyn H. Patel

## TABLE OF CONTENTS

1		1
2	I. Introduction.....	1
3	II. Argument.....	3
4	A. If the Court grants Plaintiffs' Anti-SLAPP motion, most of Polgar's motion to	
5	compel will be moot or will seek documents not relevant to Plaintiffs' claims..	3
6	B. But for the Defendants' misconduct, the emails would not have been	
7	disclosed .....	4
8	i. Polgar and Alexander stole the emails at issue .....	4
9	ii. Polgar has engaged in a "Scheme" to make it appear that third parties	
10	stole and disclosed the UCSF's communications, when in fact she is	
11	behind the misconduct .....	5
12	C. UCSF used all reasonable means to protect the privileged materials both	
13	before and after the theft .....	8
14	D. Polgar's arguments fail regarding each of the categories of confidential emails	
15	that she seeks to compel.....	11
16	i. The "Next Steps Email" was stolen and only later disclosed due to the	
17	misconduct of Polgar .....	11
18	ii. Polgar is not entitled to pre-November 4, 2007 documents.....	12
19	iii. The UCSF did not disclose opinion of counsel regarding	
20	indemnification.....	13
21	iv. The UCSF sought to destroy the two emails attached to the Sam Sloan	
22	complaint .....	14
23	v. The attorney-client privilege protects communications made subject to a	
24	joint defense agreement .....	15
25	vi. Polgar's generalized "fraud" argument must fail .....	17
26	III. Conclusion.....	17
27		
28		

## TABLE OF AUTHORITIES

2	<i>Aiken v. Texas Farm Bureau Mutual Insurance Company, et al.</i> , 151 F.R.D. 621, 624	
3	(E.D. Tex. 1993) .....	16
4	<i>Feldman v. Allstate Ins. Co.</i> , 322 F.3d 660, 665-66 (9th Cir. 2003).....	4
5	<i>In re Auclair</i> , 961 F.2d 65, 69 (5th Cir. 1992) .....	16
6	<i>In re LTV Securities Litigation</i> , 89 F.R.D. 595, 604 (N.D. Tex. 1981) .....	16
7	<i>In re Skiles</i> , 102 S.W.3d 323, 326 (Tex.App.-Beaumont 2003) .....	16
8	<i>Triple A Machine Shop, Inc. v. State of California</i> , 213 Cal. App. 3d 131, 144 (1989). ...	4

## Statutes

11	Cal. Civ. Code §425.16 ("Anti-SLAPP statute").....	<i>passim</i>
12	TEX.R. EVID. 503(b)(1)(C).....	16

RONENBERGER BURGOYNE, LLP  
150 Post Street, Suite 520  
San Francisco, CA 94108  
[www.KBInternetLaw.com](http://www.KBInternetLaw.com)

1 Plaintiffs United States of America Chess Federation ("USCF") and Randall D.  
 2 Hough ("Hough") (collectively, "Plaintiffs") hereby oppose Defendant Susan Polgar  
 3 ("Polgar")'s Motion to Compel Production of Documents Withheld on an Invalid  
 4 Assertion of the Attorney Client Privilege (the "Motion").

5 **I. INTRODUCTION**

6 Over 3,000 emails were stolen from Plaintiffs. Many of these emails contained  
 7 highly sensitive, attorney-client privileged communications. Upon the commencement  
 8 of Polgar's Texas lawsuit, and again upon Polgar being named in this lawsuit, the USCF  
 9 put Polgar's counsel on notice that these attorney-client privileged communications had  
 10 been stolen. The USCF even provided Polgar with affidavits describing the theft of the  
 11 emails and explaining that none of the recipients has disclosed the emails. The USCF  
 12 repeatedly demanded that Polgar's counsel turn over the stolen communications and  
 13 delete all copies in their possession. Moreover, there could have been **no**  
 14 **misunderstanding** by Polgar and her counsel about the nature of the stolen emails. The  
 15 faces of the documents clearly show that the documents are privileged communications.  
 16 Moreover, Polgar's business associate, Gregory Alexander, has been criminally indicted  
 17 for the theft of these emails.

18 Despite this knowledge by Polgar and her counsel, Polgar has continually and in  
 19 bad faith disclosed portions of these stolen, privileged emails throughout this litigation.  
 20 Instead of waiting for a judicial determination of privilege related to the emails, counsel  
 21 intentionally and repeatedly disseminated highly sensitive documents over the  
 22 objections of the USCF. This misconduct is simply inexcusable. The Court should  
 23 impose the most severe sanction available on Polgar and her counsel, to punish this  
 24 egregious misconduct.

25 To cover up their misconduct, Polgar and Alexander ("Defendants"), and their  
 26 civil defense counsel, created a straw man scheme (hereinafter, the "**Scheme**") to make  
 27 it appear that persons other than Polgar and Alexander had stolen and later disclosed  
 28 USCF emails. The Scheme involved anonymously posting the stolen emails to the

1 Internet, printing pages from such website, then deleting content from such website, and  
2 thereafter submitting the printouts to the Court on a theory that privilege has been  
3 waived. Clumsy written admissions by Polgar's counsel serve as an incontrovertible  
4 admission to this Scheme, as detailed below. The Court should impose the heaviest  
5 sanction possible on Polgar due to her intentional interference with her adversary's  
6 attorney client relationship.

7 Making a bad situation worse, the statements in Polgar's Motion are highly  
8 misleading. Of the over 3,000 emails stolen, only two privileged emails were attached  
9 to Mr. Sloan's Texas counterclaims, and Polgar has not used either of those emails in  
10 her arguments. Polgar then implies that all of UCSF's counsel's emails had been  
11 posted to the ECF-Pacer system by Mr. Sloan, thus destroying privilege across the  
12 board, despite the fact that only two emails have been attached to court filings and  
13 despite the fact that the UCSF has requested that the court in Texas remove these two  
14 emails from the ECF-Pacer system.

15 Further, Polgar has produced multiple versions of a stolen email (the so-called,  
16 "Next Steps" email) from UCSF counsel to the UCSF Legal Subcommittee. In Polgar's  
17 versions of the Next Steps email, the date has been altered, the subject line has been  
18 changed, the sender and recipients have been masked, and content has actually been  
19 deleted from the email. Polgar's first story is that she, and her counsel, pursuant to the  
20 Scheme, discovered the Next Steps email on a blog, even though, at the time of  
21 Polgar's statement, the content had been deleted. Now Polgar's counsel has changed  
22 the story and claims that Polgar got the Next Steps email at a certain Google Groups  
23 hyperlink on the Internet, even though Polgar admits that the document no longer exists  
24 at that link. Importantly, no one has seen this stolen email on the Internet other than  
25 Polgar, and she does not even bother to claim that the Next Steps email has been  
26 intentionally or negligently disclosed by the UCSF. Despite Polgar's complete lack of  
27 any basis for claiming waiver of privilege of the Next Steps email, and despite her and  
28 her counsel being on notice that such email was stolen, Polgar has repeatedly disclosed

1 this email in court filings, over the objection of UCSF counsel. This conduct must be  
 2 sanctioned by the Court.

3 Polgar also makes a variety of other arguments about privilege waivers for other  
 4 categories of documents. Polgar a) objects to privilege under a joint defense  
 5 agreement regarding communications between the UCSF and persons Polgar has sued  
 6 in Texas; b) objects to the assertion of privilege regarding communications prior to the  
 7 formation of the Legal Subcommittee, despite the multiple threats by Polgar to sue the  
 8 UCSF prior to the formation of such committee; and c) objects to the assertion of  
 9 privilege concerning communications between Illinois counsel and the UCSF about  
 10 indemnification, due to a comment made in the case at hand. These arguments  
 11 demonstrate a desperate attempt by Polgar to give up evidence for her SLAPP  
 12 counterclaims where none exists. There is no evidence of any waiver of privilege, and  
 13 the Court should accordingly deny Polgar's Motion.

14 **II. ARGUMENT**

15 **A. If the Court grants Plaintiffs' Anti-SLAPP motion, most of Polgar's  
 16 motion to compel will be moot or will seek documents not relevant to  
 17 Plaintiffs' claims.**

18 On August 24, 2009, Plaintiff Hough and the third party defendants in this case  
 19 filed an anti-SLAPP motion to strike Polgar's counterclaims. In accordance with Code  
 20 of Civil Procedure section 425.16(g), and in the interest of judicial economy, Plaintiffs  
 21 request that the Court refrain from ruling on the evidentiary issues in Polgar's Motion. If  
 22 the Court grants Plaintiff's anti-SLAPP motion, the permissible discovery for Polgar will  
 23 be greatly limited.

24 The significance of these anti-SLAPP motions has escalated due to the UCSF  
 25 Board of Delegates' recent actions. Specifically, the Delegates recently a) unanimously  
 26 ratified the prior actions of the Executive Board concerning this litigation, and b)  
 27 unanimously denied Polgar's indemnification request, which largely if not entirely moots  
 28 Polgar's counterclaims. Based on the Delegates' ratification, Plaintiff's anti-SLAPP  
 motion has become irrefutable, and Polgar's evidentiary requests have become moot.

**B. But for the Defendants' misconduct, the emails would not have been disclosed.**

i. **Polgar and Alexander stole the emails at issue.**

If it weren't for the theft of over 3,000 emails from the UCSF and Randall Hough, the privileged emails at issue would never have been disclosed. The theft was clearly wrong, and in fact criminal, as reflected in the indictment of Polgar's co-defendant, Alexander. [D.E. 146.] Further, the UCSF has alleged that Polgar was Alexander's accomplice, as evidence demonstrates that Polgar directed Alexander to unlawfully access Hough's email account.<sup>1</sup> Simply put, Polgar stole Plaintiffs' privileged communications. Thus, Polgar cannot introduce this stolen evidence to support her claims.

Where a party's procurement of evidence is sufficiently egregious, a court can exclude the improperly obtained evidence or take other appropriate action to achieve justice and ameliorate the effect of the improper conduct. *Triple A Machine Shop, Inc. v. State of California*, 213 Cal. App. 3d 131, 144 (1989). The general rule regarding unlawfully obtained evidence in federal court is that such evidence will be excluded when the procurement of the evidence violated federal protections. See *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665-66 (9th Cir. 2003).

The simple fact that the emails at issue in Polgar's Motion were stolen should be dispositive by itself. The fact that the Defendants are the ones actually responsible for the theft is an additional reason to reject Polgar's Motion. Polgar cannot steal Plaintiffs' privileged emails, publish them to the world, and then claim that Plaintiffs' waived their privilege.

11

11

11

<sup>1</sup> Polar has admitted sending Alexander this message: "BTW, I sent to the board a confidential letter about Hanken yesterday. Can you check to see if Randy H forwarded to Hanken?" (Declaration of Susan Polgar in Support of Defendant's Reply to Plaintiff's Opposition to Motion to Transfer, p. 7 at Ex. A [D.E. 811].)

ii. Polgar has engaged in a “Scheme” to make it appear that third parties stole and disclosed the UCSF’s communications, when in fact she is behind the misconduct.

To hide evidence of their misconduct, Defendants, and their civil defense counsel, created a straw man Scheme to make it appear that persons other than Polgar and Alexander had stolen and disclosed UCSF emails. The Scheme involved four steps. First, the Defendants anonymously posted the stolen, privileged emails an Internet website. Second, the Defendants, or their counsel, printed pages from this website, immediately after Defendants uploaded the stolen emails to the website. Third, the Defendants deleted the stolen emails from the website. Fourth, Defendants have submitted these printouts from the website to the Court as “evidence” that the stolen emails cannot be privileged because the emails were at one point on the “public” Internet. The inherent flaws with Defendants’ Scheme are apparent. But for the wrongful actions of the Defendants (i.e. the theft of the emails and the lies about the emails that followed), the emails would never have left the possession of the UCSF. Moreover, the Defendants cannot create their own “evidence” of waiver by themselves posting the stolen emails to the Internet.

Despite their planning, Defendants Scheme was exposed in the fall of 2008. Polgar filed her complaint in Texas on August 7, 2008. On August 25, 2008, counsel for the UCSF informed Polgar’s Texas counsel that Polgar had referenced stolen, attorney-client privileged emails in Polgar’s complaint in Texas. The letter demanded that Polgar refrain from using all such privileged materials, and that Polgar segregate the same into sealed envelopes until the issue could be ruled upon by the judge. (Declaration of Karl Kronenberger in Support of Opposition to Motion to Compel (“Kronenberger Decl.”) ¶2, Ex. A.)

Polgar’s counsel was indignant and responded by providing printouts from a blog entitled, <http://uscf-said.blogspot.com> (“Blog”), containing copies of the stolen emails. (Kronenberger Decl. ¶3, Ex. B.) At the time UCSF counsel received these printouts, all content had been deleted from the Blog, and, to date, the UCSF is aware of no persons

1 other than Polgar and her counsel who have seen the contents of the Blog live on the  
 2 Internet. (Declaration of Bill Hall in Support of Opposition to Motion to Compel ("Hall  
 3 Decl."). ¶2.) Further, Polgar's counsel indignantly stated, on October 15, 2008:

4 "I have previously provided to your office by private U.S. Mail, copies of  
 5 internet postings which were posted publically all as reflected on the face  
 6 of those documents. My office obtained those copies of postings solely  
 7 through the public internet posting and after they had been published to  
 8 the world on the public internet site. More particularly, the internet site  
 9 was <http://uscf-said.blogspot.com> entitled, 'To Fall on the Ground From  
 10 the Sky.' Prior to the public posting, neither Susan Polgar nor Paul  
 Truong had knowledge of the content of any of the referenced e-mails or  
 information. Likewise, at no time did either Susan Polgar or Paul Truong  
 have access or privileges to enter any of the claimed secure e-mails sites  
 (Kronenberger Decl. ¶4, Ex. C.) (emphasis added by Polgar counsel, not  
 USCF counsel).

11 After receiving a copy of the printouts from the Blog, the UCSF served a  
 12 subpoena on Google, which owns the Blog service in question. The subpoena asked  
 13 Google to provide information on the identity of the owner of the Blog and when it was  
 14 created. Google responded with documents that show that the Blog was created on  
 15 July 31, 2008, just seven days before Polgar filed her complaint in Texas. (Declaration  
 16 of Sumeena Birdi in Support of Plaintiffs' Opposition to Defendant Polgar's Motion to  
 17 Compel ("Birdi Decl.") ¶2, Ex. A.) More importantly, Polgar had possession of the stolen  
 18 emails contained on the Blog dating back to December 2007, by Polgar's own  
 19 admission. (Motion, p. 14.) Further, the UCSF has presented evidence, which Polgar  
 20 has not disputed, that Polgar had in her possession some of the stolen emails in  
 21 January and June 2008, months before the Blog was even created. (Hall Decl. ¶3.)  
 22 In fact, the final act that precipitated the filing of this lawsuit was when Polgar emailed  
 23 the UCSF Executive Board in June 2008, before the creation of the Blog, quoting from  
 24 stolen emails. (*Id.* ¶4.) Defendants' Blog story simply doesn't hold water.

25 Casting further doubt upon the Scheme is the fact that the Blog has been  
 26 forensically linked to Alexander, Polgar's business partner. The UCSF has produced  
 27 evidence to Polgar, which Polgar fails to bring to the Court's attention, that the Blog was  
 28 created using an IP address owned by the University of Washington and associated

1 with Alexander. (Birdi Decl. ¶3, Ex. B-C.) Alexander is an employee of the University of  
 2 Washington (Kronenberger Decl. ¶5), and, as stated above, has been indicted for his  
 3 theft of the emails. (See *supra*.) Alexander has admitted that Polgar "hired" him,  
 4 (Kronenberger Decl. ¶6, Ex. L) and the UCSF has alleged that Alexander is the  
 5 business partner of and agent for Polgar. (FAC ¶8.) Simply put, the Blog, at the center  
 6 of Polgar's straw man Scheme, has been forensically linked to Polgar and her business  
 7 partner, Alexander, who has been indicted.

8 Polgar lied about getting the stolen emails from the Blog, as it would have been  
 9 impossible for her to do so before the July 31, 2008 creation of the Blog. When the  
 10 UCSF produced copies of the Google Blog information, containing the Blog creation  
 11 date, Polgar and her counsel changed their story.

12 Tucked away in a footnote to Whitney Leigh's declaration is Polgar's and Leigh's  
 13 current story about where Polgar supposedly obtained the stolen email to which they  
 14 primarily refer. Mr. Leigh states that the stolen email was obtained from the link  
 15 [http://groups.google.com/group/rec.games.chess.politics/browse\\_thread/thread/401b45c548d5860f9b80lnk=gst&q=kronenberger#9b805b3a94a5b64a](http://groups.google.com/group/rec.games.chess.politics/browse_thread/thread/401b45c548d5860f9b80lnk=gst&q=kronenberger#9b805b3a94a5b64a), but that the content  
 16 "has since been removed." (Declaration of G. Whitney Leigh in Support of Defendant  
 17 Susan Polgar's Motion to Compel Production of Documents withheld on an Invalid  
 18 Assertion of the Attorney-Client Privilege, fn. 2.) (emphasis added) In another  
 19 declaration filed by Mr. Leigh, he very carefully worded his explanation about how and  
 20 where he obtained the stolen emails, stating, "I have never read any email  
 21 correspondence between Karl Kronenberger or any other counsel for the UCSF and the  
 22 UCSF or its Executive Board (the "subject emails") that has not been published on  
 23 the internet." (Declaration of G. Whitney Leigh [D.E. 170] ¶2.) (emphasis added)  
 24 Under the Scheme, however, Defendants placed the stolen emails on the Internet in a  
 25 lame attempt to hide their source, for just long enough for their counsel to print them,  
 26 thereby allowing counsel to say that they obtained the stolen emails "from the Internet."  
 27 Accordingly, Mr. Leigh's declarations are useless. This is more than gamesmanship by

1 Mr. Leigh. It is unethical attorney conduct. Making Polgar's explanation even more  
 2 unbelievable, the UCSF is aware of no persons other than Polgar and her counsel who  
 3 saw the content supposedly existing at the above inactive Internet hyperlink.

4 Casting even further doubt on Polgar's flimsy explanation is the fact that Polgar  
 5 has redacted the header information on this email, without any explanation, and Polgar  
 6 has not provided a digital copy of this stolen email. (See, Declaration of G. Whitney  
 7 Leigh in Support of Defendant Susan Polgar's Motion to Compel Production of  
 8 Documents withheld on an Invalid Assertion of the Attorney-Client Privilege, Ex. E.)  
 9 The header information and a full digital copy of the email may contain information that  
 10 would further implicate the Defendants, and accordingly, Polgar should be ordered by  
 11 the Court to turn over this information immediately.

12 Due to the misconduct as reflected in the Scheme, the Court should deny  
 13 Polgar's Motion. Further, the Court should levy the most severe sanction possible on  
 14 Polgar both to punish and to deter Polgar and her attorneys from engaging in further  
 15 unethical misconduct.

16 **C. UCSF used all reasonable means to protect the privileged materials  
 17 both before and after the theft.**

18 Upon Polgar first disclosing snippets of UCSF confidential emails in December  
 19 2007 and January 2008, the UCSF asked Polgar where she obtained the emails.  
 20 Polgar would not respond with specificity, instead stating that she had obtained them  
 21 from a newsgroup on the Internet. The UCSF conducted a search of these newsgroups  
 22 for these emails, but could not locate any evidence of the stolen emails within Internet  
 23 newsgroups at that time. (Hall Decl. ¶5.)

24 Upon Polgar referencing privileged materials in her complaint filed in Texas  
 25 action, the UCSF promptly sent a letter to Polgar's counsel demanding that Polgar, a)  
 26 identify all attorney-client communications in Polgar's possession, b) segregate the  
 27 privileged materials into an envelope, c) destroy all other copies of the materials, d)  
 28 inform the UCSF who has viewed the materials, and e) amend their complaint to

1 remove references to such materials. (Kronenberger Decl. ¶2, Ex. A.) As a follow up to  
 2 Texas counsel, UCSF counsel restated its demands and provided affidavits of the  
 3 recipients of the emails at issue, all stating that they did not disclose the emails to any  
 4 third parties. (Kronenberger Decl. ¶7, Ex. D.)

5 And when Polgar made an appearance in the case at hand, through attorney  
 6 Whitney Leigh, UCSF counsel sent Mr. Leigh an email on November 7, 2008, asking  
 7 Mr. Leigh to “stay vigilant about some attorney client emails” that were stolen; informing  
 8 Mr. Leigh that attorney-client communications had been stolen from the UCSF;  
 9 informing Mr. Leigh that the UCSF has waived no privilege; and attaching affidavits of  
 10 the recipients of the stolen emails stating that they did not disclose the emails to any  
 11 third parties. (Kronenberger Decl. ¶8, Ex. E.)

12 Moreover, during a meet and confer session on April 21, 2009 that the parties  
 13 recorded, counsel for Polgar, Whitney Leigh, admitted that he was in possession of  
 14 some of the 3,000 stolen emails that were never actually published to the Internet. In  
 15 fact, he admitted reading from some of these very confidential emails. (Kronenberger  
 16 Decl. Ex. F, p. 40.) Shockingly, when cornered about when and where Mr. Leigh  
 17 himself had obtained the stolen emails, he responded, “I got them off the Web,” again  
 18 reverting to the strategy under the Scheme. (*Id.*) Still cornered and pressed to explain  
 19 where exactly “on the Web” he got the stolen emails, Mr. Leigh changed course and  
 20 stated that they were somehow attached to a filing by Mr. Sloan. (*Id.* p.41.) However,  
 21 the emails attached to Mr. Sloan’s complaint were unrelated to the privileged emails  
 22 from which Mr. Leigh was reading (i.e. emails concerning Mr. Mottershead supposedly  
 23 “hacking” into Mr. Alexander’s UCSF account). (Kronenberger Decl. ¶10, and Ex. F, p.  
 24 42.)

25 Following this meet and confer session, UCSF counsel sent three separate  
 26 letters to Mr. Leigh, demanding that he turn over the stolen emails that he admitted he  
 27 had read. (Kronenberger Decl. ¶11, Exs. G-I.) To date, Mr. Leigh has not returned or  
 28 confirmed destruction of any of these stolen emails. (*Id.*)

1       Despite Polgar's refusal to cooperate, the UCSF diligently sought to destroy any  
 2 public copies of their privileged communications. In the Texas litigation, the UCSF  
 3 made a voluminous document production to Polgar of 13,617 pages.<sup>2</sup> As Polgar  
 4 requested, the UCSF's production included all emails received by all UCSF parties from  
 5 Sam Sloan. Sam Sloan is a defendant and counterclaimant in the Texas action, and  
 6 upon filing his counterclaim and exhibits, he emailed as a PDF document his  
 7 counterclaim and exhibits to all the UCSF parties. Thus, in response to discovery  
 8 requests from Polgar, the UCSF turned over all correspondence to the UCSF from  
 9 Sloan, including his counterclaims and exhibits exactly how they were uploaded into the  
 10 ECF-Pacer system. Unbeknownst to the UCSF, in one of the many attachments to  
 11 Sloan's counterclaims were two emails stolen from the UCSF and posted to the  
 12 Internet. The UCSF was simply not aware that Sloan had attached these to his  
 13 counterclaims or that the UCSF had inadvertently provided these stolen emails to  
 14 Polgar by handing over copies of the counterclaims exhibits. (Kronenberger Decl. ¶12.)  
 15 Within days of the UCSF becoming aware that Mr. Sloan's filings had contained copies  
 16 of two stolen emails, the UCSF a) informed Polgar's counsel of the inadvertent  
 17 disclosure, and thereafter b) filed an objection with the court in Texas about Sloan's  
 18 objectionable exhibits, noting how Mr. Sloan has consented to the removal of the two  
 19 privileged emails from the public ECF-Pacer system. The court has not yet ruled on this  
 20 matter. (*Id.* ¶13, Ex. J, and *Polgar v. United States of America Chess Federation Inc et al*, 5:08-cv-00169-C, D.E. 163, par. 35 and 39.)

22       When these two emails were marked as exhibits in Texas depositions, the UCSF  
 23 marked the documents as "CONFIDENTIAL" under the Texas protective order. Despite  
 24

---

25       <sup>2</sup> As an aside, Polgar claims that, "[t]o date, plaintiffs have not produced any documents  
 26 in this action in response to document requests in this case." (Motion, p. 8.) This  
 27 statement, however, is misleading for two reasons. The UCSF produced over 461  
 28 documents in initial disclosures and 191 documents in response to Polgar's discovery  
 request. Bates numbers in the California action run from USCF000001-USCF000652.  
 Further, the UCSF had already produced in Texas 13,617 pages of documents before  
 Polgar's California requests. (Kronenberger Decl. ¶19.)

1 the UCSF's request to the Texas court to remove these two emails from the ECF-Pacer  
 2 system, and despite the CONFIDENTIAL designation of these documents, Polgar has  
 3 continued to refer to these two emails in court filings and actually attach these emails to  
 4 court filings. (Kronenberger Decl. ¶14.) The UCSF has brought this to the attention of  
 5 Polgar's counsel, Mr. Leigh, but he has ignored the UCSF's requests to amend his  
 6 filings. (Plaintiffs' Opposition to Polgar's Administrative Motion to Seal Certain  
 7 Documents and to Withdraw the Declaration of G. Whitney Leigh in Support of Polgar's  
 8 Response to Plaintiff's Objection to Evidence, D.E. 174.) Further, the UCSF has  
 9 petitioned this Court to extend a recent sealing motion by Mr. Leigh to cover these two  
 10 emails. (*Id.*)

11 Simply put, the UCSF has done all it possibly could do to identify what emails  
 12 where stolen and to keep them off the Internet. Moreover, but for the misconduct of  
 13 Polgar and Alexander, these emails would not have been stolen. Simply put, the  
 14 Defendants should not benefit from their own misconduct, while the UCSF has strove to  
 15 fix Defendants' misconduct. Thus, the Court should deny Polgar's Motion.

16 **D. Polgar's arguments fail regarding each of the categories of confidential  
 17 emails that she seeks to compel.**

18 **i) The "Next Steps Email" was stolen and only later disclosed due  
 19 to the misconduct of Polgar.**

20 The so-called "Next Steps" email, which is attached to the declaration of Whitney  
 21 Leigh at Exhibit E, has never been, to the knowledge of the UCSF, attached to any  
 22 court filing or otherwise disclosed to the public, except for the action of Mr. Leigh  
 23 attaching this stolen email to his motion to compel and his motion to disqualify counsel  
 24 (D.E. 108-5, Ex. Y). The UCSF has presented affidavits of the recipients of this email,  
 25 stating that they did not disclose the email to any third parties. The only persons who  
 26 have ever seen this email on the Internet as claimed by Polgar are Polgar and her  
 27 attorney Mr. Leigh. Further, Alexander, Polgar's business partner, has been indicted for  
 28 stealing this email. Notably, Mr. Leigh, while he claims that he does not represent

1 Alexander, does have some relationship with him, as Mr. Leigh has efiled in this case  
 2 multiple documents for Alexander. (See, for e.g. docket entries 16, 18, 25.)

3 To reiterate, the Next Steps email was only disclosed due to the misconduct of  
 4 the Defendants, and Defendants are the only ones who have ever seen it posted to the  
 5 Internet. Mr. Leigh knew this document was privileged, but he made the clear decision  
 6 to attach it, unsealed, to his declaration filed with the Court. The Court must address  
 7 this misconduct.

8 As Polgar has no basis to argue that privilege has been waived regarding the  
 9 Next Steps email, the Court should find that this email is privileged. The UCSF also  
 10 requests that the Court order Polgar to destroy all copies of this email, not file copies of  
 11 the email as attachments to briefing to the Court, and not refer to the email in any way  
 12 in court filings. Last, the UCSF requests that the Court remove this email (Exhibit E to  
 13 Mr. Leigh's declaration) from the ECF-Pacer system.

14 **ii) Polgar is not entitled to pre-November 4, 2007 documents.**

15 While Polgar argues that pre-November 2007 emails could not be privileged, her  
 16 argument fails when such communications were made in anticipation of litigation and  
 17 discuss legal strategy.

18 When the Mottershead Report was disclosed in the fall of 2007, Polgar  
 19 immediately started making threats to sue the UCSF and other UCSF-related parties.  
 20 She repeated these threats many times verbally and in email exchanges. The UCSF  
 21 hired counsel to, among other things, assess the threats by Polgar and perform a risk  
 22 analysis for the UCSF regarding Polgar's threats. (Hall Decl. ¶6.)

23 All pre-November 4, 2007 communications between the UCSF, its board  
 24 members and counsel are protected as joint defense communications. Any such  
 25 communications were between various potential co-defendants and their counsel  
 26 concerning actual threats of litigation by Polgar. Accordingly, these are protected by the  
 27 joint defense privilege.

Moreover, emails dated before November 4, 2007 (i.e. before the formation of the Legal Subcommittee) could not be relevant to the unauthorized access allegations in this case, which didn't even start to occur until late November 2007. Further, the Court should delay determining whether these emails should be disclosed until after the Court rules on Plaintiffs' anti-SLAPP motion to strike because if the Court grants the motion to strike, none of the pre-November 4, 2007 emails could potentially be relevant or reasonably lead to relevant material for Polgar.

Lastly, Polgar is no longer an Executive Board member, nor even a member, of the USCF. Accordingly, Polgar has no right to these confidential communications concerning Polgar's threats to sue the USCF.

iii) The UCSF did not disclose opinion of counsel regarding indemnification.

USCF counsel's comment to the Court on April 15, 2009 was an opinion regarding the fact that Polgar had not yet provided information to the USCF to support her request or details about how the USCF had supposedly mishandled her request. Simply put, the comment by counsel was not a legal opinion and did not reference a legal opinion.

As a preliminary matter, all issues regarding Polgar's indemnification are now moot, as the USCF Board of Delegates has unanimously denied Polgar's request for indemnification. (Declaration of Bill Hall Regarding Comprehensive Ratification by the USCF Board of Delegates, [D.E. 182] ¶9.) Further, to the extent that Polgar requests information to support her counterclaims, the Court should delay in ruling on this matter until after the Court has ruled on the Plaintiffs' anti-SLAPP motion.

Regarding Polgar's allegations, Polgar at the time of the April 15, 2009 hearing had not, and to date still has not, provided facts to the UCSF regarding her request for indemnification or why it was supposedly mishandled. (Kronenberger Decl. ¶15.) While the comment by UCSF counsel at the hearing was admittedly disjointed, the comment ("that it's premature" [D.E. 91, p.27-28]) reflects that fact that Polgar had not yet

1 provided factual information to the UCSF to support her request or details about how  
 2 the UCSF had supposedly mishandled her request. What Polgar omits from her Motion  
 3 is that this factual request, which is clearly not a legal opinion, has already been  
 4 disclosed to Polgar in the form of a letter from Illinois counsel to Polgar. (Kronenberger  
 5 Decl. ¶16, Ex. K.) In that letter, Illinois counsel states to Polgar's counsel,

6 "I ask that you provide me with your client's position in writing as to  
 7 how she believes she is entitled to indemnification for each of the  
 8 separate lawsuits she seeks indemnification for and how each of  
 her requests for indemnification were handled inappropriately."

9 (Id.) Accordingly, UCSF's counsel's statement to the court about Polgar's request being  
 10 premature had nothing to do with any legal opinion. As an important side note, Polgar  
 11 never responded to this letter from Illinois counsel, despite all her protestations to the  
 12 Court about how her indemnification request had been mishandled. (Id. ¶17.)

13 The UCSF counsel never publicly commented on any "opinion letter," nor have  
 14 they invoked counsel's advice selectively. UCSF counsel have not, as case law  
 15 prohibits, used the comment, "that it's premature," as a sword, and then used privilege  
 16 as a shield. Counsel's comment to the court simply was not a legal opinion, but instead  
 17 pointed out that any action was premature until Polgar provided more information to the  
 18 UCSF. For these reasons, the UCSF did not waive any privilege on this topic by  
 19 UCSF's counsel's comment.

20 **iv) The UCSF sought to destroy the two emails attached to the Sam  
 Sloan complaint.**

21 As stated above, the only stolen emails that were filed with a Court, other than  
 22 those filed by Polgar, were filed by Sam Sloan in the Texas litigation. Mr. Sloan  
 23 attached two of the stolen emails to his counterclaims, and emailed a voluminous PDF  
 24 of the counterclaims and attachments to many parties, including the UCSF. When the  
 25 UCSF became aware that Sloan had attached these stolen emails to his counterclaim,  
 26 the UCSF, a) immediately informed Polgar that a copy of Sloan's attachments that  
 27 included the stolen email had been inadvertently produced to her in discovery, b) asked  
 28 Polgar to return the documents, c) obtained the consent of Sloan to remove the

1 documents, and d) asked the Texas court to remove the documents from the ECF-  
 2 Pacer system. (See, *supra*, at Section C.)

3 There simply are not any other actions the UCSF could have taken to protect the  
 4 privilege associated with these two stolen emails, and the UCSF acted immediately  
 5 upon getting notice of this disclosure. Most importantly, but for the misconduct of the  
 6 Defendants, these emails never would have been stolen in the first place, and  
 7 accordingly the Defendants should not be able to benefit from their own misconduct.

8 **v) The attorney-client privilege protects communications made  
 9 subject to a joint defense agreement.**

10 Polgar attacks the UCSF claims of privilege as to emails sent to third parties,  
 11 including “Brian Mottershead, Brian Lafferty, and Jerry Hanken.” (Motion, p. 17.) What  
 12 Polgar fails to explain to the court is that Polgar is referring to entries in two privilege  
 13 logs that were created and produced for the Texas action. Importantly, in Texas, Polgar  
 14 sued not only the UCSF, its board members and counsel, but also a handful of third  
 15 parties, including Brian Mottershead, Brian Lafferty, and Jerry Hanken. These third  
 16 parties have all needed to coordinate with UCSF counsel for the Texas litigation.  
 17 Specifically, because Polgar did not specify in her Texas complaint how the supposedly  
 18 wrongful acts were attributed to the defendants, the defendants have coordinated on  
 19 their defense. Further, Polgar has sent nearly identical discovery requests to all the  
 20 parties in Texas, and the Texas defendants have coordinated in responding to  
 21 discovery. (Hall Decl. ¶7.) In short, there has been a common legal interest held by all  
 22 the defendants in the Texas action, supporting the existence of a joint defense privilege.

23 Polgar is attempting to circumvent the requirement of addressing these discovery  
 24 concerns in Texas with Judge Cummings by bringing them to the attention of the Court  
 25 in California. Moreover, the joint defense communications between parties in the  
 26 defamation action in Texas are not in any way relevant to the unauthorized access case  
 27 pending here in California. For these reasons, Polgar should be prohibited from  
 28 obtaining this sort of broad discovery without going through Judge Cummings.

1        Furthermore, the defendants in the Texas action have been relying on clear case  
 2 law in the Fifth Circuit that prohibits the discovery of any consultations among  
 3 defendants, or their counsel, and any sharing or pooling of work product or other  
 4 confidential documents in reliance on the joint defense privilege. *In re Auclair*, 961 F.2d  
 5 65, 69 (5th Cir. 1992) (the joint defense privilege extends the attorney client privilege to  
 6 any third party made privy to privileged communications if that party “has a common  
 7 legal interest with respect to the subject matter of the communication”); *Aiken v. Texas*  
 8 *Farm Bureau Mutual Insurance Company, et al.*, 151 F.R.D. 621, 624 (E.D. Tex. 1993) )  
 9 (“The privilege encompasses shared communications between various co-defendants,  
 10 actual or potential, and their attorneys, prompted by threatened or actual, civil or  
 11 criminal proceedings, ‘to the extent that they concern common issues and are intended  
 12 to facilitate representation in possible subsequent proceedings.’” *citing In re LTV*  
 13 *Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex. 1981)); *In re Skiles*, 102 S.W.3d  
 14 323, 326 (Tex.App.-Beaumont 2003) (“The joint defense privilege is part of the attorney  
 15 client privilege recognized in Texas Rule of Evidence 503.”); TEX.R. EVID. 503(b)(1)(C)  
 16 (the “joint-defense” privilege protects “confidential communications made for the  
 17 purpose of facilitating the rendition of legal services ... by the client or a representative  
 18 of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a  
 19 representative of a lawyer representing another party in a pending action and  
 20 concerning a matter of common interest therein.”).

21        Polgar makes the argument that she should be able to obtain in California what  
 22 she cannot obtain in Texas. However, Polgar has no authority for such a proposition,  
 23 and none of her case law citations deal with matters where parallel litigation is pending  
 24 in multiple jurisdictions.

25        The Texas defendants do have a written joint defense agreement, which the  
 26 UCSF has withheld from Polgar due to privilege. However, the UCSF will submit this  
 27 document to the Court for *in camera* review if necessary.

28 //

vi) Polgar's generalized "fraud" argument must fail.

Polgar makes a generalized argument that as a result of supposed fraud in which the Plaintiffs engaged, that all attorney client communications of Plaintiffs should be disclosed. For her fraud argument, Polgar relies exclusively on the “Next Steps” email that, as detailed above, was never attached to any of Sam Sloan’s court filings. No one has ever actually seen this email on the Internet other than Polgar and her counsel. Further, the email at issue a) has had its subject line, recipients and sender information deleted; b) a fake subject line has been inserted, c) content in the email has been changed, d) portions of the email have been deleted, and, e) in the latest version of the email provided to the UCSF by counsel, Polgar has redacted the header of the email, obscuring key information about where the email came from. (Kronenberger Decl., ¶18.) So, in addition to the serious questions about how Polgar and her counsel came into possession of this email, the email is impossible to authenticate.

The UCSF will not comment on the content of its privileged communications, and Polgar's fantastical allegations based on doctored, stolen, attorney-client communications obviously fail if she is barred from referring to such stolen communications, as her argument is based solely on material that was stolen. More importantly, Polgar must not be able to benefit from her misconduct by getting to use in any way the communications which she played a part in stealing and disclosing to the public.

### III. CONCLUSION

For the reasons stated herein, the Court should:

- a. deny Polgar's Motion;
- b. order that Polgar turn over all copies of correspondence between the UCSF and its counsel, unredacted and in paper and digital format, and after UCSF has confirmed receipt of materials, delete all copies in Polgar's possession;

- 1 c. order that Polgar cease referring to, or attaching as exhibits to Polgar
- 2 court filings, USCF materials that are protected under the attorney-client
- 3 privilege;
- 4 d. order the removal of all privileged materials from the ECF-Pacer system;
- 5 e. impose sanctions against Polgar and/or her counsel i) for intentionally
- 6 misrepresenting the source of stolen emails, and ii) knowingly and
- 7 repeatedly attaching and referring to privileged material in Polgar court
- 8 filings.

9  
10 Dated: August 31, 2009

**KRONENBERGER BURGOYNE, LLP**

11  
12 By: s/ Karl S. Kronenberger  
13 Karl S. Kronenberger

14 Attorneys for UNITED STATES OF  
15 AMERICA CHESS FEDERATION, INC.  
16 and RANDALL D. HOUGH